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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-RCJ Subproceedings: C-125-B 3:73-CV-00127-RCJ-WGC **UNITED STATES' RESPONSE TO MOTIONS TO DISMISS**

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The United States of America ("United States"), through counsel designated to represent the United States in this proceeding, responds to the following motions to dismiss and substantive pleadings:

1) *Walker River Irrigation District's Motion to Dismiss Claims of the United States Based Upon State Law Pursuant to Fed. R. Civ. P. 12(b)(1)* (Doc. 2161) and points and authorities in support (Doc. 2161-1) (reference hereafter will be to the points and authorities (Doc. 2161-1) as "WRID Memo");

2) *Nevada Department of Wildlife Motion to Dismiss Concerning Threshold Jurisdictional Issues* (Doc. 2160) (reference hereafter will be as "NDOW Memo"); and

3) *Joinder by Circle Bar N Ranch, LLC et al. to Walker River Irrigation District's Motion to Dismiss Claims of the United States Based Upon State Law Pursuant to Fed. R. Civ. P. 12(b)(1) and Supplemental Argument* (Doc. 2162) (reference hereafter as "Circle Bar N Ranch Memo").

For the reasons described below, the defendant parties are entitled to no relief from this Court under their motions and the motions should be denied.[1]

I. Introduction

The Court ordered (Doc. 1958) the defendant parties to present any and all motions to dismiss based on threshold jurisdictional challenges to the Amended Counterclaims of the United States (Doc. 59) ("U.S. Counterclaims") and the Amended Counterclaims of the Walker River Paiute Tribe ("Tribe") (Doc. 58) ("Tribal Counterclaims") (collectively "Counterclaims"). These motions were not intended to raise jurisdictional challenges that turn on factual determinations. *See* Transcript of Status Conference 55:8 – 57:6 Nov. 4, 2013. Instead, these motions were to raise legal challenges to the jurisdiction of the Court similar in nature to Fed. R. Civ. P. 12(b)(1) motions. Transcript of Status Conference 40:6 – 41:12. Though the parties previously briefed motions to dismiss in the spring of 2014, in response to the Court's *Order* (Doc. 1958), the parties present their arguments again under the schedule approved by the Court. *See* (Doc. 2150).

[1] The Walker River Irrigation District will be referred to in this Response as "WRID." WRID was joined in its motion/memorandum by the following: Circle Bar N Ranch (Doc. 2162) and Mono County (Doc. 2164). Mono County did not supplement the arguments presented by WRID. Nevada Department of Wildlife will be referred to in this Response as "NDOW." Circle Bar N Ranch, LLC *et al.* will be referred to in this Response as "Circle Bar N Ranch."

The defendant parties raise three challenges. WRID argues that the Court did not retain jurisdiction to hear additional water right claims under the 1936 Decree.[2] As a result, WRID impliedly asks that this Court dismiss the Counterclaims and expressly asks that this Court declare that the Counterclaims constitute a "new action" with "new claims." According to WRID, this Court has jurisdiction to hear and decide the United States' water right claims based on federal law only if the Court somehow declares this litigation a "new action." But, even if the Court declares a new action, WRID argues that this Court has absolutely no jurisdiction to hear and decide the United States' water right claims based on state law. Circle Bar N Ranch joins and largely echoes WRID's argument concerning jurisdiction under the 1936 Decree; however, it expressly seeks dismissal of the Counterclaims in their entirety. Circle Bar N Ranch spends the remainder of its brief espousing purported principles of the Federal Reserved Water Rights Doctrine that have no bearing on any jurisdictional motion to dismiss, that are beyond any argument called for by the Court, and that are largely incorrect. For its part, NDOW raises no argument that the United States and Tribe may not invoke the retained jurisdiction of this Court to seek additional water rights. Instead, NDOW seeks to limit the routine relief to which the United States might ultimately be entitled once this Court adjudicates the United States' claims, and this is beside the point as well.

These arguments to dismiss the Counterclaims and to transform them into a "new action" are without merit. First, this federal district court has exclusive and ongoing jurisdiction to hear and decide additional water right claims in the Walker River basin. Further, this Court expressly retained jurisdiction to modify the Decree and the arguments presented by WRID and Circle Bar N Ranch to the contrary are unsupported by the language of the 1936 Decree. Second, WRID's attempt to transform this action into a

[2] On April 14, 1936, the Court issued a decree concerning many water rights in the Walker River basin. The Court's decision concerning the Tribe's water right was appealed to the Ninth Circuit, United States Court of Appeals and reversed. On remand, the 1936 Decree was amended by the District Court on April 24, 1940. Throughout this Response, the decree will be referred to as the "1936 Decree" or "Decree" and shall refer to the Decree as amended in 1940.

"new action" is without basis. The United States did not initiate a "new action" when it filed its Counterclaims and WRID cannot simply conjure one. In fact, the United States has waived its sovereign immunity only in this action under the continuing jurisdiction of the 1936 Decree. Otherwise, the United States maintains its sovereign immunity with respect to any "new action" that WRID might contemplate and the Court is without the ability to cast aside the United States' sovereign immunity to initiate a "new action." Third, NDOW's motion does not raise a jurisdictional challenge to the Counterclaims; at best, its argument is premature and it does not form the basis for any relief. Nonetheless, when the Court determines the additional water rights to which the United States is entitled, the Court will have the jurisdiction going forward to administer and enforce those water rights in priority against any surface water and groundwater users that might improperly infringe on those rights.

For the reasons articulated below, this Court must deny all relief requested by each of the defendant parties.

II. Procedural Background

The procedural background of the extensive litigation activities over the waters of the Walker River basin is relevant to the Court's consideration of its continuing, exclusive jurisdiction.

Litigation over Walker River basin water began in 1902 when the Miller & Lux Company filed suit against numerous water users located largely in California.[3] Between 1902 and 1919, the litigation initiated by Miller & Lux was the subject of numerous published opinions and traveled through at least two federal courts of appeal.[4] Ultimately, between 1910 and 1919, the caption of this litigation became *Pacific Livestock*

[3] In 1902, federal litigation was generally heard in both the United States District Court for the District of Nevada (established July 23, 1866, 14 Stat. 209) and the United States Circuit Court (established February 27, 1865, 13 Stat. 440). On January 1, 1912, the United States Circuit Court was abolished and all pending matters of the United States Circuit Court, including the 1902 litigation, were transferred to the United States District Court with overlapping jurisdiction. 36 Stat. 1087, 1167.

[4] *See* Miller & Lux v. Rickey et al., 123 F. 604 (C. C. D. Nev. 1903); Miller & Lux v. Rickey et al., 127 F. 573 (C. C. D. Nev. 1904); Miller & Lux v. Rickey et al., 146 F. 574 (C. C. D. Nev. 1906); Rickey Land and

Company v. Antelope Valley Land and Cattle Company. On March 22, 1919, this Court issued a final decree in *Pacific Livestock* that became known as "Decree 731." In that decree, well before the United States initiated this action, this Court determined numerous water rights arising under California and Nevada state law.

At no time was the United States a party to the *Pacific Livestock* litigation. In 1924, the United States initiated this action before this Court, the very same federal district court that issued Decree 731. In this action, the United States asserted the direct flow surface water irrigation rights of the Reservation, as it existed at the time. Litigation on the United States' action proceeded into the 1930s. This Court issued its published opinion in 1935. *United States v. Walker River Irr. District,* 11 F. Supp. 158 (D. Nev. 1935). Subsequently, this Court issued a decree on April 14, 1936. The United States appealed the Court's decision concerning the surface water irrigation water rights of the Tribe to the Ninth Circuit, which reversed. *United States v. Walker River Irr. District,* 104 F.2d 334 (9th Cir. 1939). On remand, the parties stipulated to changes to be made to the 1936 Decree, this Court accepted those changes on April 24, 1940, and the Court re-issued the 1936 Decree, as amended.

III. Argument

A. This Court has exclusive jurisdiction over all water right claims of the Walker River basin.

WRID and Circle Bar N Ranch each assert that the Court lacks jurisdiction in this action to hear any claim of any water user seeking any water right in addition to those decreed under the 1936 Decree. WRID Memo at 7-9; Circle Bar N Ranch Memo at 5-6. Both WRID, impliedly, and Circle Bar N Ranch, expressly, further requests that all such claims of the United States be dismissed from this action. WRID Memo at 21; Circle Bar N Ranch Memo at 19. WRID's and Circle Bar N Ranch's positions are contrary to established law and the plain language of the 1936 Decree. As discussed below, this Court maintains both exclusive and continuing jurisdiction in this action to determine additional water right claims within

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Cattle Co. v. Miller & Lux, 152 F. 11 (9th Cir. 1907); Rickey Land and Cattle Co. v. Miller & Lux, 152 F. 22 (9th Cir. 1907); Rickey Land and Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910).

the Walker River basin.

1. The Court's jurisdiction over the waters of the Walker River basin in this action is exclusive.

Federal and state courts have long recognized that actions associated with the adjudication of water rights, though technically *in personam* actions, are more in the nature of *in rem* actions. *Nevada v. United States*, 463 U.S. 110, 143-144 (1983) ("water adjudication are more in the nature of *in rem* proceedings"); *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013-1014 (9th Cir. 1999). As such, the United States Supreme Court has "recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976).[5] The rule for such proceedings is that "the first court to gain jurisdiction over a *res* exercises exclusive jurisdiction over an action involving that *res*." *Alpine Land & Reservoir Co.*, 174 F.3d at 1013 ("when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the jurisdictional power of the other, as if it had been carried physically into a different territorial sovereignty." quoting *Kline v. Burke Const. Co.*, 260 U.S. 226, 229-30 (1922)).[6] The Ninth Circuit has reasoned that this well-established principle of exclusivity supports a decree court's inherent ability to enforce its decree:

> The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the

[5] This well-established rule is embraced under Nevada law. Nev. Rev. Stat. § 533.450(1) ("[O]n stream systems where a decree of court has been entered, the action [challenging any order of the State Engineer] must be initiated in the court that entered the decree." (emphasis added)). Therefore, even Nevada law recognizes that this Court, the Federal District Court for the District of Nevada, is the only Court that may hear water rights challenges concerning Walker River water rights claims and disputes.

[6] This action was initiated in 1924 under statutory jurisdictional authority, 42 U.S. Stat. 849, which, as explained below, continues under the 1936 Decree's retention of jurisdiction. Even if independent statutory jurisdiction were needed today to support the ongoing exclusive jurisdiction of the Court in addition to the jurisdiction expressly retained by the Court in the 1936 Decree, such jurisdiction is readily apparent and established under the following statutes, among others: 28 U.S.C. § 1331 (claims arising under federal law); 28 U.S.C. § 1345 (claims asserted by the United States); and 28 U.S.C. § 1367 (supplemental jurisdiction).

> judgment, yet have [another] court construing what the [decree court] meant in the judgment. Such an arrangement would potentially frustrate the decree court's purpose.

Alpine Land & Reservoir Co., 174 F.3d at 1013 quoting *Flanagan v. Arnaiz,* 143 F.3d 540, 545 (9th Cir.1998).

As explained in more detail above, litigation over the water rights of the Walker River basin began in this Court more than a century ago when an action was brought to adjudicate water rights between various water users in both California and Nevada. *See* section II, above. In the course of the *Pacific Livestock* litigation, the Supreme Court determined that this Court properly had exclusive jurisdiction over the competing water rights at issue. *Rickey Land and Cattle Co. v. Miller & Lux*, 218 U.S. at 262 ("[T]he court first seised should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states."). When this Court first established jurisdiction in 1902, it was "seised" with the *res* and thereafter had exclusive jurisdiction over that *res*. *Id.*; *see also*, *Kline*, 260 U.S. at 235 ("The well-established rule … [is] that where the action is one in *rem* that court—whether state or federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the res …"); *Alpine Land & Reservoir Co.*, 174 F.3d at 1013 ("the district court's jurisdiction is exclusive because its jurisdiction is best characterized as *in rem* jurisdiction.").

Since 1902, litigation over water rights in the Walker River basin has been properly brought exclusively before this Court; no other state or federal court has exercised jurisdiction over water in the basin. In 1919, this Court decreed the rights of numerous Nevada and California water users and issued a decree. *Pacific Livestock Company, et al. v. T.B. Rickey, et al.,* Decree No. 731. Although the Court and the parties attempted to address the United States' water rights, the United States did not waive its sovereign immunity to that suit. As a result, Decree No. 731 did not, and could not, have any effect on federal or tribal interests. *See id.* at 10.

This Court acquired jurisdiction over the United States for the first time in 1924, when the United States filed this action to determine the surface water irrigation rights of the Reservation. Then, after more

than a decade of litigation, this Court issued its 1936 Decree, which incorporated not only water rights arising in Nevada but also water rights arising in California determined under Decree 731. 1936 Decree at 10 – 59; *see also Walker River Irr. District,* 11 F. Supp. at 160. Thus, with the 1936 Decree, this Court, through the filings of the United States and this Court's exclusive jurisdiction over the *res*, had determined all claims to water rights in the Walker River basin that had been previously brought by any claimant—whether in California or Nevada.

In 2001, the Nevada Supreme Court recognized this Court's exclusive jurisdiction over the waters of the Walker River basin under the 1936 Decree. In *Mineral County v. Nevada*, 20 P.3d 800 (Nev. 2001), Mineral County sought a *writ* of prohibition to prevent Nevada from granting additional rights to withdraw surface or ground water from the Walker River basin. The Nevada Supreme Court examined the jurisdiction of this Court under the 1936 Decree to determine whether any jurisdiction remained in state courts with respect to such waters. Embracing the Ninth Circuit's reasoning and holding in *Alpine Land & Reservoir Co.*, the court determined that no state court jurisdiction remained given this Court's continuing and exclusive jurisdiction under the 1936 Decree:

> We conclude that the Decree Court, which has had continuing involvement in the monitoring of the Walker River for more than eighty years, is the proper forum for the redress that Petitioners seek. Moreover, because the [1936] Decree involves the allocation of interstate waters between California and Nevada, we believe that a consistent and controlling interpretation by a federal court of competent jurisdiction is more appropriate.

Id at 807. Thus, the highest state court in Nevada has conclusively determined that no Walker River water rights claimant may seek relief in Nevada state courts; its reasoning on this issue is persuasive.

For more than a century, this Court has exercised exclusive jurisdiction over the the waters of the Walker River basin. Today this Court maintains such jurisdiction. To the extent that the United States, or anyone, brings water right claims based on either federal or state law, this Court has exclusive jurisdiction to hear such claims.

2. The Court has retained jurisdiction under the 1936 Decree to adjudicate additional water rights.

WRID and Circle Bar N Ranch assert that this Court did not retain continuing jurisdiction under the 1936 Decree to adjudicate new water right claims. WRID Memo at 7 – 9; Circle Bar N Ranch Memo at 3 – 6. Both WRID and Circle Bar N Ranch purport to rely on language in the 1936 Decree, yet each ignores the plain language of the Decree, through which this Court, without limitation, retained jurisdiction to, among other things, "modify" the Decree. As discussed below, in this action this Court retained the entirety of its exclusive jurisdiction over the waters of the Walker River basin, including its ability to modify the Decree to adjudicate the Counterclaims.

a. Under the plain language of the 1936 Decree, the Court retained jurisdiction to hear and decide additional water right claims for the waters of the Walker River basin in this action.

It is well established that a decree court may retain jurisdiction to modify its decree in the future. *Arizona v. California*, 460 U.S. 605, 617-618 (1983) (*Arizona II*). In fact, the Supreme Court has long embraced the notion that retention of jurisdiction by a single court in water rights adjudications avoids piecemeal litigation, promotes consistency, and supports unified proceedings. *Colorado River Water Conservation Dist.*, 424 U.S. at 819. In 1936, as expressed in the plain language of the Decree, the Court retained broad, ongoing jurisdiction over the waters of the Walker River basin that naturally includes the ability to adjudicate additional water right claims.

The Court must presume the language used in the 1936 Decree was the result of thoughtful and deliberate action. *St Louis, Kansas City, and Colorado RR Co. v. Wabash Railroad Co. and City of St. Louis*, 152 F. 849, 852 (8th Cir. 1907), *aff'd.* 217 U.S. 247 (1910) (when interpreting a decree, "the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention."). In the absence of ambiguity, the Court should look to the ordinary meaning of the terms used. *Id.* at 852 ("Upon its face there is no ambiguity in [the decree's] terms. They suggest no limitation or exception, and when the terms

of a decree are plain and clear their ordinary meaning and effect may not be lawfully contracted or extended unless it appears with reasonable certainty that such was the purpose of the court."). A party who challenges the clear language of a decree "assume[s] no light burden." *Id.*

Courts apply similar rules of construction when examining consent decrees, and the rules associated with construing consent decrees are helpful here.[7] Such decrees are interpreted basically like contracts. *United States v. ITT Continental Banking Co.,* 420 U.S. 223, 236-37 (1975). Accordingly, the scope of the decree "must be discerned within its four corners." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Courts may look beyond the decree only if the decree is ambiguous. *ITT*, 420 U.S. at 233; *see Segar v. Mukasey*, 508 F.3d 16, 22 (D.C. Cir. 2007). Like language in a contract, language in a decree "is not ambiguous merely because the parties later disagree on its meaning," but only if it is "reasonably susceptible of different constructions." *Bennett Enterps., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995). By examining the unambiguous language of the 1936 Decree, this Court can easily discern that jurisdiction was retained in this action to modify the Decree by adjudicating additional water rights.

In the 1936 Decree, the Court 1) determined the surface water irrigation rights of the Reservation from the direct flow of the Walker River based on irrigation uses as they existed at the time; 2) incorporated numerous surface water irrigation rights that had been previously determined in Decree 731; 3) adjudicated additional surface water irrigation rights of non-Indians; and 4) retained complete authority to administer and apportion all waters of Walker River. 1936 Decree at 10; 10 – 59; 59 – 70; and 73-75 respectively. The Court quite plainly retained broad ongoing jurisdiction over the Walker River basin:

> The Court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of point of diversion or of the place of use of any water user, but no water shall be sold outside of the basin of the Walker River except that appurtenant to the lands of Mrs. J.S. Conway and R.P. Conway referred to in the foregoing tabulation.

[7] The 1936 Decree was not issued as a consent decree.

> The Court shall hereafter make such regulation as to notice and form or substance of any application for change or modification of this decree, or for change of place or manner of use of water as it may deem necessary.

1936 Decree at 72:29 through 73:1 – 10 ¶ XIV (as amended April 24, 1940). With this language, the Court articulated at least four distinct purposes for which it retained jurisdiction: 1) changing the duty of water; 2) correcting the Decree; 3) modifying the Decree; and 4) regulatory purposes, including changing points of diversion or places of use. *Id.* The Court also retained broad, ongoing jurisdiction to establish procedures to resolve "any application for change or modification" of the Decree. *Id.*

Under the plain terms of the 1936 Decree, the Court expressly, and without limitation, retained broad jurisdiction to "modify" the Decree. That the Court placed no limitation on this term reflects the breadth of potential modifications inherent in the ongoing administration and apportionment of all waters of the Walker River basin. A substantial limitation cannot now be read into the word "modify" at WRID's and Circle Bar N's insistence simply to serve the purpose of defeating the Counterclaims. *See Armour*, 402 U.S. at 682 ("For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."). Further, at the conclusion of the litigation in 1936, although the Court had jurisdiction over many water users in the Walker River basin in Nevada and California, the surface flow of the Walker River was not fully appropriated and many water rights remained unaddressed (*e.g.* domestic water rights, groundwater rights, water rights for other federal lands, commercial use rights, natural resource development use rights, water rights created/developed subsequent to 1924, *etc.*).[8] Only by retaining broad jurisdiction could the Court hope to administer the interrelated water rights of the Walker River basin in priority. Thus, the Court's retained jurisdiction to modify the Decree must be interpreted broadly, not in the self-servingly narrow

[8] Both this Court and WRID recognize that the waters of the Walker River were not fully appropriated in 1936. WRID Memo at 8-9 ("[The Order entered April 9, 1990] provides that application to appropriate unappropriated waters of the Walker River or its tributaries in the State of California are to be processed in accordance with the laws of the State of California." quoting April 9, 1990 Order (Case 125) at para. 3, p. 3).

manner WRID and Circle Bar Ranch assert. The Court retained ongoing jurisdiction over matters associated with the Decree, including modifying the Decree itself. This ability to consider modifications to the Decree naturally includes the ability to determine and incorporate additional water rights.

It is also clear from the language of the Decree that the Court specifically contemplated that it would need to develop a host of Walker River basin-specific procedures, as needed, to allow the parties to petition the Court under the ongoing jurisdiction retained under the 1936 Decree. Indeed, the extensive procedures associated with this very subproceeding (C-125-B) are a vivid illustration of "such regulation as to notice and form or substance of any application for change or modification of this decree" contemplated by the Court under the 1936 Decree. 1936 Decree at 73, ¶ XIV lns. 7 – 10. Most importantly, the "changes" and "modifications" contemplated here to "modify" the Decree are, by the plain language of the Decree, broader than, distinct from, and in addition to "correcting" the Decree, "changing the duty of water," and "chang[ing the] point of diversion or [ ] the place of use of any water user." Any other conclusion would write this language out of the Decree. Such a result could not have been intended when the Decree was issued and cannot now be imposed because WRID and Circle Bar N Ranch desire it so. WRID's and Circle Bar N Ranch's assertions that no claim for additional water rights may be made in this action or under the 1936 Decree fails to comport with the plain language of the Decree.

b. Since issuance of the 1936 Decree, the Court has understood that additional water right claims existed in the Walker River basin.

Ultimately, the plain language of the 1936 Decree speaks for itself, and the Court need not look beyond that plain language to conclude that the Court retained jurisdiction in this action to modify the Decree by adjudicating additional water rights. Nonetheless, the same conclusion is supported by contemporaneous, published statements by the Court, and by briefs before the Court which demonstrate that the Court recognized the existence of additional water rights claims not included in the 1936 Decree.

These claims include a storage right claim for Weber Reservoir.

The United States did not bring a claim for Weber Reservoir when it initiated this action in 1924.[9] Yet, by the time the Court issued its 1936 Decree, it was well aware that Weber Reservoir was near-built and that the United States contemplated additional water rights for this reservoir.

In its published opinion of 1935, the Court discussed approvingly the "Blomgren Report," a study the United States Department of the Interior produced in 1928 at the direction of Congress that examined the Tribe's storage needs on the Reservation. *Walker River Irr. District,* 11 F. Supp. at 164-165. Indeed, the Court's opinion specifically and fully embraced the Blomgren Report's recommendations that 1) water rights be adjudicated at the earliest possible date; 2) the entire Walker River system be placed under ongoing supervision of the Court; and 3) a storage reservoir be built on the Reservation. *Id.* at 164-65. The Court observed that "[t]he construction of the proposed dam and reservoir would undoubtedly greatly increase the present supply and probably insure water sufficient for all needs of the reservation throughout the year." *Id.* at 165 (emphasis added). Thus, in 1935 the Court recognized that the water rights it decreed for the Tribe did not address or meet "all needs" of the Tribe and there remained at least the important, outstanding, unmet need for reservoir storage.

WRID also embraced the Blomgren Report and recognized the importance of Weber Reservoir to the Reservation. Specifically, WRID informed the Court of Weber Reservoir's existence, and urged the Court to take the potential additional storage of the Tribe into account as it considered the exceptions to the Special Master's Report. After this Court's 1935 opinion but before this Court issued its 1936 Decree, this Court took briefing from the United States, WRID, and others concerning exceptions to the Report of the Special Master. In this briefing, WRID informed the Court of the existence and near completion of Weber Reservoir. *Memorandum of Walker River Irrigation District and other Defendants in Answer to "Brief on*

[9] Congressional appropriations were not secured for, and construction was not begun on, Weber Reservoir until 1933, after the evidentiary record on the litigation initiated in 1924 was closed in 1932. *Walker River Irr. District,* 11 F. Supp. at 162.

Exceptions to the Master's Findings, Conclusions and Proposed Decree" Filed By Plaintiff Through Its Attorneys, Ethelbert Ward and William S. Boyle (January 8, 1936) ("WRID 1936 Memorandum"). WRID informed the Court "the fact remains that [a money] appropriation has [now] been made [by the federal government] to construct the reservoir … and the water has been stored in the reservoir, which facts we assume will not be challenged by plaintiff." WRID 1936 Memorandum at 6. Further, WRID described the connection and relationship between Weber Reservoir and the Blomgren Report. WRID correctly pointed out to the Court that "[a]pparently, subsequent investigations [to the Blomgren Report] have proven the advisability of the construction of a dam at or near the Weber site because the dam and reservoir are now actually existing things." *Id.* at 7.

By the time the Court issued the 1936 Decree, it was fully aware that the United States had created a new reservoir; an action the Court itself had supported as a solution to the additional water needs on the Reservation. As a result, the Court was aware that the United States had an anticipated, obvious claim for storage water not resolved under the Decree and it retained broad jurisdiction to modify the Decree so that it could adjudicate additional water rights in the future.[10] WRID's and Circle Bar N Ranch's narrow interpretation of the word "modify" in the 1936 Decree would rob the Court of the ability to effectuate this one very real, specifically contemplated example of an additional water right.

c. The Court has previously determined that the claims for additional water rights of the United States were properly brought before this Court under the 1936 Decree.

Finally, although in a different context, this Court has already considered the propriety of the United States' claims and has determined that those claims are properly brought before the Court in this

[10] At the time the Decree was first issued in 1936, the Court was of the erroneous opinion that the United States was not entitled to federal reserved water rights for the Tribe. *Walker River Irr. District*, 104 F.2d at 335. However, the Court's past error of law is of no moment to the question before the Court today. Whether the Court in 1936 considered the United States to have an additional storage rights claim under state or federal law, the fact remains that the Court would need to determine what that right was and to incorporate that right into the Decree.

action under the continuing jurisdiction of the 1936 Decree. WRID initiated Subproceeding C-125-A under the 1936 Decree in 1991, when it sought injunctive and declaratory relief against the California State Water Resources Control Board for alleged interference with WRID's decreed water rights. (C-125-A Doc. 3, January 9, 1991). In response to WRID's petition, the Tribe answered and submitted a counterclaim for additional water rights under the 1936 Decree. (C-125-A Doc. 12-2, March 18, 1992). Subsequently, the United States also answered the petition and submitted a counterclaim for additional water rights that was virtually identical to the Tribe's counterclaim. (C-125-A Doc. 50, October 20, 1992). In response to these Counterclaims, WRID and the State of Nevada moved to dismiss, alleging that the counterclaims were not properly before the Court. The Court disagreed, holding that the claims of the United States and the Tribe were inexorably intertwined with the property rights established in the 1936 Decree:

> [t]he Tribe's and the United States' claim against [WRID] arises out of the property rights established and not established in the [1936] Decree. [WRID's] claim against the Board also arises out of the property rights established in the [1936] Decree. Since both claims arise out of the same transaction or occurrence, the Tribe's and the United States' claim against the District is appropriately brought here. The Court will treat the claim as if it were brought as a cross-claim."

Order October 27, 1992 (Doc. 15) at 4 – 5 (emphasis added). The Court's language illustrates its plain recognition that the Counterclaims properly belong in this action under the continuing jurisdiction that the Court retained to modify the 1936 Decree.

3. WRID and Circle Bar N Ranch arguments against retained jurisdiction are inconsistent with the plain language of the 1936 Decree and they fail to otherwise establish that the Court did not retain jurisdiction to adjudicate additional water rights under the 1936 Decree.

The United States has established that this Court has exclusive jurisdiction over the waters of the Walker River basin and that under the 1936 Decree it has continuing jurisdiction in this action to hear and decide the Counterclaims. The defendant parties argue that the 1936 Decree does not permit any party to bring additional water rights claims in this action. They present three arguments to support this assertion,

none of which are persuasive.

WRID's first argument begins with the unsupported assertion that the Counterclaims "do not seek to … modify the Walker River Decree." WRID Memo at 7. Yet, WRID fails to explain why the word "modify" is not sufficiently broad to include the adjudication and incorporation of such claims. WRID's conclusory assertion can mean only one of two things: WRID either considers the word "modify" to be synonymous with other words in the Decree, such as "change" or "correct," or it has in mind some other cramped definition that imposes a self-serving limitation on the word "modify." If the former, WRID's interpretation would render the word "modify" redundant, meaningless, and unnecessary. This cannot stand because it flies in the face of the established presumption that decree language is thoughtfully considered and deliberate. *See St. Louis, Kansas City, and Colorado Railroad Co.*, 152 F. at 860. If the latter, WRID's assertion directly conflicts with the language of the Decree, which includes no such limitation.

Contrary to WRID's constrictive reading, the Court's deliberate use of the words "modify" and "modification" without limitation in paragraph XIV of the 1936 Decree conveys broad, ongoing jurisdiction under the Decree. Taken in context, the modifications contemplated by the Court must relate to actions in addition to those specifically listed in the Decree, that is, actions other than changing water duty, correcting the Decree, or regulating places of diversion and use. Rather than specify the universe of modifications that might be subsequently presented, however, the Court left this term open-ended. Indeed, by the very language of the Decree the Court was prepared to consider "any application … for modification" of the Decree. The Court certainly did not limit modifications to mere corrections of errors or redundantly assign the word "modify" as a catch-all for other actions it had already specified. The adjudication and incorporation of the Counterclaims under the 1936 Decree is wholly consistent with the language of the Decree preserving the Court's continuing jurisdiction to modify the Decree.[11]

[11] As discussed in Section III.A.2.c, the Court has the ability to modify the Decree to incorporate additional water rights. *See* e.g., 1990 Order at 3 ¶ 3. WRID expressly recognizes this. WRID at 17 ("the

Circle Bar N Ranch makes a similar argument on this point. Circle Bar N Ranch Memo at 5-6. For its part, Circle Bar N Ranch's focuses on language from the decree associated with *Arizona II*. *Id.* at 6 (quoting the underlying decree and emphasizing the phrase "any supplementary decree."). Circle Bar N Ranch argues that a court must specifically invoke some variation of the phrase "supplemental decree" to trigger retention of jurisdiction to modify a decree. Circle Bar N Ranch simply mischaracterizes *Arizona II*. Examination of the opinion reveals that, other than quoting the decree, the Court makes no mention of and, more importantly, attributes no meaning to the phrase "any supplementary decree" or to the words "supplementary" or "supplemental." *Arizona II* offers no support to Circle Bar N Ranch's argument.

WRID's second argument delves far outside any language used by the Court and relies on circumstances that have nothing to do with the Court's retained jurisdiction in this case. WRID argues that the United States has, in two instances, impliedly conceded that it may bring additional water right claims only in a new action. First, WRID notes that when the United States brought this case in 1924, a previous water rights action in *Pacific Livestock* had occurred and that Decree 731, entered therein, was under the administration of this Court. WRID Memo at 8. As a result, WRID argues, the United States brought this case as a new action. At the time *Pacific Livestock* was litigated (as described in section III.A.1, above, 1902 through 1919), however, the United States was not joined in that litigation, and the Court had no jurisdiction over the United States to adjudicate any aspect of the United States' water rights. Therefore, the United States was under no obligation to intervene in *Pacific Livestock*.[12] In addition, when the United States initiated this action in 1924, it asserted the federal reserved surface water irrigation rights of the Reservation, as it existed, for the first time. Because the Court lacked jurisdiction over the United

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United States might bring those [additional water rights] to this Court for administration under the [1936 Decree]." (emphasis added)). This ability naturally derives, part and parcel, from a correlative ability to determine in the first instance whether claimed additional water rights exist.

[12] When the Court and the parties proceeded anyway to adjudicate water rights for the United States and incorporate them in Decree 731 (Decree 731 at 18, 19, 20, and 21; *Walker River Irr. District,* 11 F. Supp. at 16) the United States had every incentive not to intervene in that action as the United States' interests were prejudged in its absence.

States in *Pacific Livestock*, the relative rights of all surface water irrigation rights previously adjudicated and decreed through Decree 731 were subject to challenge by the United States. Ultimately, and only by stipulation of the United States, all surface water irrigation rights decreed in *Pacific Livestock* were incorporated into the 1936 Decree. *See* 1936 Decree at 10 – 59; *Walker River Irr. District,* 11 F. Supp. at 162. In the end (1936), *Pacific Livestock* was in effect subsumed into this action. Finally, the United States could not have filed its 1924 complaint in *Pacific Livestock* under Decree 731 for the simple reason that, unlike the 1936 Decree in this action, the Court did not retain jurisdiction under Decree 731.

The other instance WRID cites to support its argument (that the United States has elsewhere conceded the need for a "new action") involves additional water right claims the United States brought in the litigation underlying the decision in *Nevada v. United States,* 463 U.S. 110 (1983). There, WRID contends, the United States initiated a new action rather than attempt to incorporate additional claims in *United States v. Orr Water Ditch Co. et al.* In Equity No A-3 (D. Nev. 1944) ("Orr Ditch Decree"). Once again, WRID ignores an important distinction: as with Decree 731, the *Orr Ditch* court did not retain jurisdiction to modify the Orr Ditch Decree. As described above, the 1936 Decree is fundamentally dissimilar to the Orr Ditch Decree in this regard, and any attempt to analogize the two is unavailing. Unlike under the Orr Ditch Decree, the Court retained broad jurisdiction to modify the 1936 Decree that naturally includes the ability to adjudicate the Counterclaims and incorporate them under the Decree.

Finally, WRID's third argument is that the United States' claims for additional water rights are analogous to the additional water rights contemplated under the Court's *Order of Appointment of California State Water Resources Board as Special Master* (C-125, Doc. 161 adopted by Order April 9, 1990, Doc. 165 ("1990 Order") at 3 ¶ 3). As an initial matter, WRID's analogy misses the mark because WRID makes no assertion that any aspect of the United States' claims for additional water rights triggers the provisions of

the 1990 Order.[13] More importantly, the 1990 Order embraces this Court's ability to modify the 1936 Decree to incorporate water rights in addition to those recognized in the 1936 Decree.

> With respect to [application to appropriate unappropriated waters of the Walker River or its tributaries in the State of California], it is the intent of this Court that … the Special Master shall timely move this Court for entry of a supplemental decree in this case recognizing any rights granted …

1990 Order at 3 ¶ 3. In fact, the 1990 Order was issued pursuant to the authority this Court retained under paragraph XIV. *Id.* at 2 ¶ 1.[14] Thus, the Court has already recognized the ability to use its continuing jurisdiction to modify the Decree to incorporate additional water rights. WRID's only counter is that the Court's ability to do so is limited to additional water right claims determined in a state administrative forum. WRID's argument is fundamentally incongruous: the Court cannot modify the 1936 Decree to incorporate additional water rights determined in a state proceeding if it does not have continuing jurisdiction under the 1936 Decree to determine the additional claims in the first instance.[15] It simply defies logic that, without mention in the 1936 Decree, the Court would retain jurisdiction to incorporate water rights determined by another unidentified court or forum, but at the same time close the

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[13] The United States cannot be compelled to appear in state court without its express consent. *United States v. Idaho ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 6 (1993) ("There is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' [by Congress] in statutory text.").

[14] Since 1936, the Court has recognized broad jurisdiction and control over water not subject to that which was decreed in 1936. In 1936, the Court directed the water master to "apportion[ ] and distribut[e] the waters of the Walker River, … ." 1936 Decree at 73, ¶ XV, lns. 27 – 30 (emphasis added). Further, in 1953 the Court authorized the water master to proportionately distribute unappropriated water to those with water rights under the 1936 Decree. *Order Approving Rules and Regulations for Distribution of Water on the Walker River Stream System* (C-125 September 3, 1953) (at 4 of Rules "If at any time the Chief Deputy Water Commissioner determines that there is more water available in the stream than is required to fill the rights of all of the vested users … then he shall prorate such excess water to all users in proportion to the rights already established."). These authorizations to apportion and distribute unappropriated water goes well-beyond the rights recognized under the 1936 Decree.

[15] Indeed, WRID very clearly embraces the fact that the Decree can be modified to incorporate additional water rights. *See* WRID Memo at 17 ("the United States might bring those [additional water rights] to this Court for administration under the [1936 Decree]." (emphasis added)). The Court's ability to administer additional water rights under the Decree naturally derives from a congruous ability to determine in the first instance whether claimed additional water rights exist.

door on its own ability to determine and adjudicate such water rights in the first instance. As exercised by the Court in the 1990 Order, the Court's ability to modify the 1936 Decree, expressly retained in paragraph XIV, permits the Court to adjudicate the Counterclaims and incorporate them into the 1936 Decree.

B. WRID's and the State of Nevada's remaining attempts to undermine jurisdiction for the United States' Counterclaims are without merit.

In the subsections above, the United States has established the jurisdictional basis on which the Counterclaims are grounded – this Court has exclusive jurisdiction over the waters of the Walker River Basin and that jurisdiction is retained in the 1936 Decree. Defendant parties' jurisdictional arguments have been squarely refuted, and the Court should find that it retained jurisdiction to modify the Decree by, among other things, adjudicating the Counterclaims. Undaunted, the defendant parties launch a host of additional arguments to undermine the Court's jurisdiction, all of which are without merit.

1. The United States did not initiate a "new action" with "new claims" for additional water rights and WRID cannot transform these proceedings into an action that the United States did not bring.

In section IV.A of its memorandum, WRID proceeds from its incorrect assumption that the Court did not retain jurisdiction under the 1936 Decree to hear any claims for additional water rights and proposes to treat the United States' Counterclaims as a "new action" made up of "new claims." WRID Memo at 11. Under this construct, WRID concedes that the Court has subject matter jurisdiction to hear all such "new claims" that are based on federal law. *Id.* At the same time, however, WRID argues that the Court does not have subject matter jurisdiction to hear — even as "new claims" in a "new action" — the United States water rights claims based on state law. *Id.* at 12 – 19.

This Court directed the defendant parties to submit jurisdictional challenges to the Counterclaims in the context of a motion to dismiss under to Fed. R. Civ. P. 12(b). *Supplemental Case Management Order* (Doc. 1865); *Transcript of Status Conference* at 55:2-5; and 66:10 – 12 (November 4, 2013); *Transcript of Status Conference* at 40:25 – 415 (July 25, 2013). WRID proceeds with its motion pursuant to Fed. R. Civ. P.

12(b)(1), which provides in relevant part: "[e]very defense to a claim for relief in any pleading must be asserted … But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; … ." (emphasis added). Necessarily, before a party may properly move to dismiss a claim, that claim must be asserted in the context of a case or an action. If the case or action itself cannot be brought as asserted in the first instance, a ruling by a federal court on the validity of a potential claim in a "new action" yet to be brought would constitute a prohibited advisory opinion. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *quoting* C. Wright, Federal Courts 34 (1963)). Thus, WRID's request to have this Court dismiss "new claims" from a "new action" that were not filed by the United States and that do not exist asks for the impossible: the equivalent of a non-binding, advisory opinion regarding claims that are not currently before the Court. Such a ruling is beyond the power of any Article III court.

More importantly, WRID cannot unilaterally make the United States a plaintiff to a "new action" that the United States has not brought or otherwise consented to. The United States' sovereign immunity prohibits any party from subjecting the United States to suit absent an express waiver. *Block v. North Dakota*, 461 U.S. 273, 280 (1983) (in the absence of an express waiver or consent to suit by Congress, sovereign immunity insulates the United States from suit). Though separate statutory bases might exist for a federal court's subject matter jurisdiction, such jurisdiction is barred if the United States' sovereign immunity is maintained. *Powelson v. U.S., by and Through Secretary of the Treasury*, 150 F.3d 1103, 1105 (9th Cir. 1998) ("Sovereign immunity is grounds for dismissal independent of subject matter jurisdiction. A statute may create subject matter jurisdiction yet not waive sovereign immunity."). Just as the parties had no power to join the United States to the *Pacific Livestock* action, WRID has no ability to foist the yoke of a "new action" on the United States today.

This Court previously secured exclusive jurisdiction over the *res* of this case in 1902. That

jurisdiction incorporated the United States in 1924, when the United States initiated this action, which resulted in the 1936 Decree. When the United States filed its claims for additional water rights in the Walker River basin in 1992, it did so in this action. It specifically invoked "the continuing jurisdiction of this Court, by virtue of the Decree entered herein, over the waters of the Walker River and its tributaries in California and Nevada." U.S. Counterclaims 21, ¶ 2. The United States did not then and does not now assert its water right claims in a new action outside of the 1936 Decree.[16] WRID cannot transform this litigation into something that it is not. The Court retained, and the United States properly invoked, ongoing jurisdiction under the 1936 Decree to adjudicate and incorporate the Counterclaims.

Finally, WRID asserts that the Court can somehow avoid involvement in issues related to groundwater if it finds that the United States' claims for additional water rights are part of a "new action." WRID at 11 n. 3. WRID is incorrect. This Court is obligated to hear any claims that are properly brought and for which it has jurisdiction. The United States and the Tribe have properly brought claims for additional water rights that include claims for groundwater rights. The Ninth Circuit has previously determined that federal reserved water rights extend to both surface water and groundwater. *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) *aff'd* 426 U.S. 128 (1976) ("In our view the United States may reserve not only surface water, but also underground water."). [17] Consequently, this Court's jurisdiction

[16] By asking that this Court "treat" the United States' claims "as a new action," WRID necessarily recognizes that the United States did not in fact bring its counterclaims in a "new action." *See* WRID Memo at 11.

[17] Even though it found no need to directly reach the question whether the federal reserved water rights doctrine extended to groundwater, the Supreme Court determined that groundwater could be curtailed by senior reserve water rights that were hydrologically connected. *United States v. Cappaert,* 426 U.S. 128 (1976); *see also United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158-59 (9th Cir. 2010) (no distinction exists between surface and groundwater when addressing reserved water rights where surface water and groundwater are connected). The United States has previously established the hydrologic connection between surface and groundwater in the Walker River basin. *United States' and Walker River Paiute Tribe's Joint Motion for Leave to Serve First Amended Counterclaims, to Join Groundwater Users, to Approve Forms for Notice and Waiver, and to Approve Procedure for Service of Pleadings Once Parties Are Joined* (Doc. 62) Attachment 1, *Affidavit of Peter M. Pyle.*

extends to both surface water and groundwater claims of the United States.

In the end, WRID's "new action" argument is nothing more than an unabashed attempt to better position itself to raise a *res judicata* argument in the future:

> The exercise of such jurisdiction should result in the treatment of the Amended Counterclaims as a new action. … [This treatment] places the claims in their proper perspective for analysis under principles of *res judicata*, rather than the equivalent of motions to modify a final judgment.

WRID at 11 – 12. Thus, WRID's real intent is revealed: WRID proposes a "new action" because it knows, presumably, that under well-established law, the doctrine of *res judicata* has very limited, if any, applicability against the United States' claims in this action. *Arizona II* 460 U.S. at 617 – 618. Ultimately, WRID's gambit fails because, for the reasons articulated above, neither WRID nor this Court has the ability to unilaterally waive the sovereign immunity of the United States and make it subject to an action that it did not initiate.

2. A Federal Court has subject matter jurisdiction to hear claims of the United States that are based on state-law.

Under WRID's "new action" construct,[18] WRID argues in section V of its memorandum that the Court does not have jurisdiction under 28 U.S.C. § 1345 (claims of the United States) or 28 U.S.C. § 1367 (supplemental jurisdiction) to hear the United States' claims that are based on state law.[19] Even if the

[18] As explained above, WRID's "new action" argument is a false one that the Court should reject as beyond the matters identified for briefing at this time. Nevertheless, out of an abundance of caution, the United States will go on to addresses WRID's argument under its false construct to correct any misconceptions it may create about the Court's jurisdiction.

[19] Similarly, Circle Bar N Ranch contends that the Court's jurisdiction is limited to claims based on federal law. Circle Bar N Memo at 6. Circle Bar N Ranch uses this connection to set forth numerous misrepresentations about the reserved rights doctrine and the purpose of lands added to the Reservation in 1936. *Id.* At 9 Although the Court need not take any action based on these arguments because they are not properly before the Court, the United States briefly addresses them. First, with regard to the reserved rights doctrine, *Id.* at 7-8, the Supreme Court's decisions in *Cappaert* and *New Mexico* regarding non-Indian reserved water rights, including the primary-secondary purpose distinction, are not directly applicable to reserved rights on Indian reservations. *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983). In addition, courts have squarely rejected the notion that reserved rights ought to be balanced against economic impacts to junior users. *Cappaert*, 426 U.S. at 138-39; *Arizona v. California*, 373 U.S. 546, 597 (1963); *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987)(quoting *Colville*

Court were to determine that these claims do not come within the continuing jurisdiction of the Court under the Decree, this federal district court has independent jurisdiction to hear the United States' claims for state-law based water rights and each of WRID's arguments fails.[20]

a. 28 U.S.C.§ 1367 – Supplemental Jurisdiction

Under 28 U.S.C. § 1367,[21] state-law based claims are part of the same case as federal claims when they "'derive from a common nucleus of operative fact' and are such that a plaintiff 'would ordinarily be expected to try them in one judicial proceeding.'" *Trustees of Construction Industry and Laborers Health and Welfare*, 333 F.3d 923, 925 (9th Cir. 2003) quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). WRID concedes that the Court has original jurisdiction to hear "water rights claimed under federal law" for both surface and groundwater claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1362. WRID Memo at 6. Yet remarkably, WRID asserts that supplemental jurisdiction does not exist for state-law based claims because the "federal and state claims do not arise out of a common nucleus of operative facts and they are not claims that would normally be tried together." *Id.* at 13. WRID highlights legal and factual differences between federal-reserved based and state-law based water right claims, but the proper test of whether this Court has supplemental jurisdiction is not whether such claims are identical. The Supreme Court has made clear that federal courts have broad supplemental jurisdiction to hear related

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Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985). Second, as to the purpose of the added lands, Circle Bar N Ranch Memo at 9, the 1936 Act reserving additional land for the Reservation does not mention "timber," "grazing," or any other particular purpose for the added land, other than it was to constitute "an addition to the Walker River Indian Reservation." Indeed, the only express reservation of timber land on the Reservation was the Act of June 21, 1906, ch. 3504, 34 Stat. 325, 358; the only express reservations of grazing land on the Reservation were the Act of June 19, 1902, 32 Stat. 744 and the Executive Order of March 15, 1918.

[20] As explained above, the United States has not initiated a "new action," and this Court does not have the ability to cast aside the United States' sovereign immunity and subject the United States to suit in a "new action."

[21] 28 U.S.C. § 1367 provides in relevant part: "…in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy … ."

state-law based claims. The Supreme Court disapproved of an inappropriately narrow view of supplemental jurisdiction that had previously developed in the federal courts. *Gibbs*, 383 U.S. at 724 (quoting *Hurn v. Oursler*, 289 U.S. 238, 246 (1933)). The Court emphasized an expansive approach that takes in the entire case before a court:

> This limited approach is unnecessarily grudging. [Supplemental] jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority …' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'

Gibbs, 383 U.S. at 725. No doubt exists under this precedent that the United States' state law claims come within the Court's supplemental jurisdiction.

Moreover, WRID's purported legal and factual distinctions fail. WRID ignores, for example, that the United States frequently asserts both state law claims and overlapping federal law claims to the same water.[22] *See e.g.,* U.S. Counterclaims at ¶¶ 24, 29, 35, 47, and 49. That the United States may present alternative legal theories in these instances does not mean it must bring these claims separately. *See Trustees of Construction* 333 F.3d at 925-926 (supplemental jurisdiction found when both state-law claim and federal law claim sought judgment on same related debt). In addition, overlapping state and federal law water rights claims have strong common, undeniable factual ties: identical water and identical water use. To establish the quantity of water associated with its claimed water rights, whether based on federal law or state law, the United States anticipates that it will present identical evidence of past and present water use to support both claims. Even in a new action, the Court would have jurisdiction under 28 U.S.C. § 1362 to hear the United States' state claims because they arise from a common nucleus of operative fact, and they would ordinarily be tried in the same proceeding as the United States' federal claims.

b. 28 U.S.C § 1345 – Claims Asserted by the United States

[22] Of course, the Supreme Court's decision in *Gibbs* makes clear that, even where the United States' state law claims do not overlap federal claims, supplemental jurisdiction exists. *Gibbs*, 383 U.S. at 725-726.

Federal district courts have jurisdiction over any case in which the United States is a party plaintiff and all claims asserted by the United States. *E.g.*, *United States v. Frazer*, 297 F. Supp. 319, 323 (D.C. Ala. 1968). [23] The pleading requirements to establish subject matter jurisdiction under 28 U.S.C. § 1345 are straightforward: 1) a civil action, suit, or proceeding, 2) commenced by the United States. The United States commenced this proceeding.[24] Therefore, subject matter jurisdiction over the United States' claims, whether for federal-law or state-law based water rights, cannot legitimately be disputed. The same is true if the United States chose to file state-law or federal-law based claims in a new action. WRID does not actually contest this point.[25] Instead, WRID argues that if such claims have not been properly perfected under state law, they are not ripe. WRID Memo at 16-19. WRID confuses matters of proof with ripeness.

As an initial matter, WRID incorrectly assumes that any state-law based rights held by the United States cannot have priorities preceding the date of any underlying federal reservation and, therefore, would require state permits. *See*, *e.g.*, WRID Memo at 15-16. The United States has owned land in Nevada, including the federal land in the Walker River basin underlying its claims, since the Treaty of Guadalupe-Hidalgo of 1848. Although much of this land has since been reserved as Indian reservation, national forest, or for military or other purposes, a significant amount has not. As a landowner and water user, the United States can appropriate rights under state law in the same manner as any other, regardless of any reservation of land.

As WRID notes, prior to 1905 in Nevada and 1914 in California, water could be appropriated by

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[23] 28 U.S.C. § 1345 provides in relevant part: "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States …."

[24] Counterclaims brought by the United States fall within this statutory grant of jurisdiction. *Peerless Ins. Co. v. United States*, 674 F. Supp. 1202, 1205-06 (E.D. Va. 1987); *see also United States v. State of Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987) (third-party complaint by United States falls within Section 1345's grant of jurisdiction).

[25] WRID Memo at 6. This fact alone seems to dispense with the entire argument that WRID presents concerning the jurisdiction of this Court under 28 U.S.C. § 1367.

placing water to beneficial use, without any requirement of obtaining a state permit. WRID Memo at 13. The United States, as a landowner and water user, did in some cases perfect water rights under state law prior to any federal reservation or state permitting requirement. The United States has also acquired water rights with similar senior priorities developed by private parties, and it holds other rights without need for permit, such as riparian rights in California.

Thus, it is not true that any state law rights held by the United States must have been the subject to state permitting. And even if that were the case, WRID recognized that the United States has properly alleged that water rights *have* been permitted. WRID Memo at 3-4, 13-15. Accordingly, it is difficult to understand the basis of WRID's argument. There is nothing unusual about a federal or state court adjudicating water right claims that have previously been the subject of state permitting requirements. In fact, in the 1936 Decree, this Court adjudicated a number of state-law water rights to WRID and other parties that had been permitted in Nevada and California. *See* 1936 Decree at 64-65 (WRID permits in California); 65-70 (water rights permitted in Nevada).

WRID's sweeping ripeness argument against the United States' state law claims is, at best, vague and non-specific and certainly does not entitle WRID to any relief. The ripeness doctrine considers whether a dispute has matured to a point that warrants a decision, and it is made up of discretionary policy considerations and the more narrow case or controversy requirement of Article III of the Constitution. 13B Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure, Jurisdiction, 2d* § 3532 at 365 (2008). The doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977); *see Sandell v. F.A.A.,* 923 F.2d 661 (9th Cir. 1990).

Nothing about the United States' state-law based claims suggests that it is premature for this Court

to adjudicate those claims. WRID acknowledges that the United States has properly asserted that its water rights include rights that "either have been permitted and certificated pursuant to Nevada or California state law, or have applications pending for appropriation before the Nevada State Engineer and before the California Water Resources Board." WRID Memo at 17 (quoting U.S. Counterclaim at 62). Yet, WRID contends that the United States has not shown sufficient specificity in its pleadings to establish that some unstated administrative hurdle has been met. WRID's ripeness argument amounts to an evidentiary challenge, that the United States has not satisfied purported state law prerequisites necessary to establish the right itself. Such a challenge is premature because the United States will, of course, have an opportunity to show that it has satisfied such requirements. At this point in this proceeding, the United State has sufficiently pleaded the matter, and to the extent the United States has any obligation to present evidence that it has met state law requirements, it will do so at the appropriate time.

Finally, the Court should easily reject WRID's unsupported assertion that, before this Court can adjudicate the United States' state law groundwater claims, comprehensive groundwater adjudications in both California and Nevada are required. WRID Memo at 19. Again, under 28 U.S.C. § 1345, this Court has subject matter jurisdiction over claims brought by the United States. That subject matter jurisdiction includes water rights claims that the United States has under state law. *Cappaert*, 426 U.S. at 145 ("[F]ederal courts have jurisdiction under 28 U.S.C. § 1345 to adjudicate the water rights claims of the United States."). WRID provides no authority to support its argument that the United States must first subject its state-law based groundwater claims to a comprehensive groundwater adjudication in state court. *See United States v. Hawaii,* 832 F.2d 1116, 1117 (9th Cir. 1987) (a district court has jurisdiction over claims of the United States under 28 U.S.C. § 1345 even though state law provides that such claims must be heard in a state court); *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980) ("The federal government, of course may sue a state in federal court under any valid cause of action, state or federal, even if the state attempts to limit the cause of action to suits in state courts only.").

28 U.S.C. § 1345 unequivocally provides subject matter jurisdiction to support adjudication of the United States' state law claims. WRID's arguments that the United States' state-law claims are not ripe and that the United States must first bring them in state court are without any legal support. WRID's motion to dismiss the United States' claims for state-law based water rights must be denied.

3. The Court has subject matter jurisdiction to enjoin interference with federal water rights.

Finally, both WRID and NDOW take issue with a somewhat routine request in the United States' prayer for relief that the Court "enter judgment and decree . . . [p]reliminarily and permanently enjoining the defendants and counter defendants from asserting any adverse rights, title or other interest in or to [the claimed] water rights." *See* WRID Memo at 19-21; NDOW Memo at 3 (arguing that the claim for relief under the Counterclaim is premature). As shown below, these complaints have no merit.

The Supreme Court has expressly determined that federal courts may enjoin surface or groundwater diversions that interfere with the United States' water rights. *Cappaert,* 426 U.S. at 143; *see also United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1161 (9th Cir. 2010) (district court has jurisdiction to enjoin groundwater use that interferes with Tribe's decreed rights). Accordingly, any water rights of the United States decreed in this action are entitled to the same protection. This is all the United States' prayer for relief requests: to enjoin "defendants and counterdefendants from asserting any adverse rights, title, or other interests in or to [the claimed] rights." U.S. Counterclaims at 31.

WRID and NDOW argue that the United States' rights must first be determined, NDOW Memo at 4, and that the United States has failed to properly identify any interfering water uses, WRID Memo at 20-21. The United States agrees that its water rights must first be determined before it can seek to enjoin any alleged interference with such rights. Indeed, once those rights have been adjudicated the Court can consider what steps must be taken to protect them. To recognize as much merely acknowledges the logical sequence of this litigation; it has nothing to do with subject matter jurisdiction, despite WRID's and

NDOW's arguments to the contrary.

As explained above, there is no doubt that this Court has subject matter jurisdiction to adjudicate the United States' water right claims. Such claims include surface and groundwater rights, based on both federal[26] and state law. There is also no doubt that this Court has jurisdiction to enjoin any uses interfering with these rights once decreed. Consideration of that issue can occur once such claims are adjudicated. Any argument that such a request for relief is lacking in jurisdiction has no support and must be rejected by this Court.

IV. Conclusion

For the reasons articulated in the paragraphs above, each motion to dismiss should be denied in its entirety.

Dated: March 20, 2015

Respectfully submitted,

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[26] As discussed above, the *Winters* Doctrine includes not only surface water, but ground water as well. *See, e.g.*, *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) ("[i]n our view the United States may reserve not only surface water, but also underground water)," *aff'd*, 426 U.S. 128 (1976); *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1097-99 (Mont. 2002) (federal reserved rights doctrine includes groundwater); *In Re Gila River System and Source*, 989 P.2d 739, 745-47 (Ariz. 1999) (same); *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) (same); *see also Cappaert v. United States*, 426 U.S. 128 (1976) (groundwater rights may be limited to protect senior federal reserved surface water rights).

CERTIFICATE OF SERVICE

It is hereby certified that on the 20th day of March 2015, service of the foregoing **UNITED STATES' RESPONSE TO MOTIONS TO DISMISS** was made through the court's electronic filing and notice system (CM/ECF) to all of the registered participants.

It is further certified that notice of the filing of the forgoing document was mailed through the United States Postal Service, postage prepaid to Unrepresented Parties who have elected to receive notice via postcard and who are listed in Docket No. 2156, dated January 14, 2015. This postcard notice complies with ¶18 of the Superseding Order Regarding Service and Filing in Subproceeding C-125-B on and by all Parties (Doc 2100).

/s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino